Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and	)	RM-11293
Policies Governing Pole Attachments	)	RM-11303
	)	

COMMENTS OF THE ZAYO BANDWIDTH ENTITIES

Charles A. Rohe
Brett P. Ferenchak
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, D.C. 20006
Tel: (202) 373-6000
Fax: (202) 373-6001
charles.rohe@bingham.com
brett.ferenchak@bingham.com

Counsel for the Zayo Bandwidth Entities

Dated: March 7, 2008

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and	)	RM-11293
Policies Governing Pole Attachments	)	RM-11303
	)	

COMMENTS OF THE ZAYO BANDWIDTH ENTITIES

Zayo Bandwidth Northeast, LLC, Zayo Bandwidth Northeast Sub, LLC, Zayo Bandwidth Indiana, LLC, Zayo Bandwidth Tennessee, LLC and Citynet Fiber Network, LLC (collectively, the "Zayo Bandwidth Entities" or "Zayo Bandwidth"), by undersigned counsel, file these Comments in response to the Commission's Notice of Proposed Rulemaking released November 20, 2007 in the above-referenced proceeding.[1] In the Comments, Zayo Bandwidth submits that the Commission should clarify that incumbent local exchange carriers ("ILECs") are specifically and intentionally excluded in Section 224 from having access to poles and, in particular, conduit at regulated rates. In addition, Zayo Bandwidth supports the adoption of a single rate for cable television systems and Telecommunications Carriers (as that term is defined in Section 224(a)), regardless of the platform over which services are provided, which single rate should be no greater than the existing telecommunications rate. Zayo Bandwidth submits that the Commission should adopt rules governing "best practices" for access to poles and conduits. Finally, Zayo Bandwidth proposes that the Commission clarify that pole attachments by cable

[1] *Implementation of Section 224 of the Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, WC Docket No. 07-245, FCC 07-187 (rel. Nov. 20, 2007) ("*NPRM*").

operators and Telecommunications Carriers must be permitted in the usable "supply space" of poles owned by electric utilities.

I. INTRODUCTION

The Zayo Bandwidth Entities are facilities-based providers of high-speed bandwidth telecommunications services to carriers, enterprise customers and business customers primarily in the mid-Atlantic and mid-west regions.[2] While some of the facilities used by the Zayo Bandwidth Entities are obtained through indefeasible rights of use agreements with other carriers, the Zayo Bandwidth Entities have also built-out their networks by placing their own fiber on the poles and in conduit of other utilities or in conduit that the Zayo Bandwidth Entities own and maintain. The Zayo Bandwidth Entities have entered into numerous pole attachment agreements with electric utilities, municipal utilities, and ILECs within their service areas. The pole attachment agreements have widely divergent rates and terms and conditions. Of the states where the Zayo Bandwidth Entities provide telecommunications service, only the District of Columbia, Illinois, Kentucky, Michigan, New Jersey, New York, and Ohio have certified that they regulate pole attachments. As Zayo Bandwidth Indiana, LLC (formerly known as Indiana Fiber Works, LLC) submitted in prior comments,[3] the Zayo Bandwidth Entities strongly believe that efficient utilization of existing utility poles and conduits is essential for the development of

---

[2] Zayo Bandwidth Northeast, LLC and Zayo Bandwidth Northeast Sub, LLC (together, "Zayo Northeast") provide telecommunications services in the District of Columbia, Maryland, New Jersey, New York, Pennsylvania and Virginia. Zayo Bandwidth Indiana, LLC ("Zayo Indiana") currently provides telecommunications services in Indiana, Kentucky and Ohio. Zayo Bandwidth Tennessee, LLC ("Zayo Tennessee") provide telecommunications services in Tennessee. Citynet Fiber Network, LLC ("Zayo Central") provides telecommunications services in Georgia, Illinois, Indiana, Kentucky, Michigan, Ohio, Pennsylvania, Tennessee, Virginia and West Virginia.

[3] Comments of Indiana Fiber Works, LLC, Inc., Petition for Rulemaking of Fibertech Networks, Docket No. RM-11303, dated Jan. 30, 2006.

competition, and the Zayo Bandwidth Entities appreciate the Commission's decision to open this rulemaking proceeding to consider these issues.

II. ILECS ARE NOT ENTITLED TO THE RIGHTS OF TELECOMMUNICATIONS CARRIERS UNDER SECTION 224

As explained in numerous Comments and Reply Comments filed in RM-11293 in opposition to the United States Telecommunications Association ("USTA") Petition for Rulemaking, a plain reading of Section 224 excludes ILECs from the pole attachment rights of Telecommunications Carriers. The Commission, therefore, must reaffirm its decisions that the exclusion of ILECs from the term "telecommunications carriers" means that section 224 does not apply to rates paid by ILECs for pole attachments, which by definition include conduit. To do otherwise, the Commission would frustrate the clear intent of Congress. In the event that Commission concludes that it can escape the clear intent of Congress and determine that it will regulate the rates, terms and conditions of ILEC pole attachments, the Commission should limit such regulation specifically to poles and specifically exclude conduit. Further, any grant should apply only to poles owned by entities with market power (e.g., electric utilities and other ILECs).

Section 224(a)(5) could not be more clear that for the purposes of Section 224, the term "telecommunications carrier" does not include any ILEC. A number of electric utilities have commented that "telecommunications carrier" and "provider of telecommunications services" are interchangeable[4] and, therefore, USTA's argument that all providers of telecommunications services are assured just and reasonable rates even if only cable television systems and Telecommunications Carriers are assured of access in nonsensical. This argument was supported

---

[4] *See* Opposition of FirstEnergy Corporation to Petition for Rulemaking of United State Telecom Association, RM-11293, at 7-8 (Dec. 2, 2005) (hereinafter *Opposition of FirstEnergy*); Statement in Opposition of Ameren Corporation, et al., RM-11293, at 6-9 ((Dec. 2, 2005) (hereinafter *Opposition of Ameren*); Joint Opposition of American Electric Power Service Corp., et al., RM-1293, at 3-7 (Dec. 2, 2005) (hereinafter *Opposition of American Power*).

by commenters through a review of the legislative intent.[5] Rather than rehash these arguments and analysis of legislative history, the Zayo Bandwidth Entities simply concur with the conclusions of these electric utilities and state that the Commission should not attempt to do by regulation what Congress has specifically decided against doing in the statute.

In addition, the plain reading of Section 224(f)(1) excludes ILECs from nondiscriminatory access to any pole, duct, conduit or right-of-way. Therefore, the Commission should not contravene Congresses intent by establishing regulations that grant ILEC nondiscriminatory access.

Should the Commission nevertheless decide that pole attachments of ILECs should be subject to just and reasonable term and condition and rates, the Commission should limit the regulation of rates to pole attachments placed on poles of utilities that have market power. In no manner should the Commission give ILECs access to poles or conduit owned by utilities that have no captive rate base such as Telecommunications Carriers, including the Zayo Bandwidth Entities. Without a captive rate base, Telecommunications Carriers must obtain debt or equity financing for the construction of their networks. Telecommunications Carriers then provide services to their customers at market-based rates. If a Telecommunications Carrier that has constructed a network that happens to have spare capacity in conduits can only provide access to such conduits to ILECs at a rate mandated by the Commission that is below what the market would bare, Telecommunications Carriers would likely restrict ILECs' access to conduit. Further, ILECs already have the market power, and thus negotiating power, they need to obtain access to poles or conduit of Telecommunications Carriers. Finally, none of the filings by ILECs or USTA in RM-11293 have demonstrated, much less suggested, that ILECs cannot obtain pole

---

[5] *See FirstEnergy Opposition* at 8-9; *Opposition of Ameren* at 9-12; *Opposition of American Electric* at 7-12.

attachments from Telecommunications Carriers. The ILECs' primary concerns appear to be with electric utilities and possibly other ILECs.

Level 3 Communications, LLC ("Level 3") astutely made many of these arguments in their Reply Comments in RM-11293.[6] For instance, Level 3 explained that "any policy that prescribes rates once access in voluntarily granted would effectively ensure that access is seldom, if ever, voluntarily granted…[, which would] diminish competition."[7] Level 3 also explained that if the Commission grants USTA's Petition, ILECs would "have the power to negotiate favorable rates with other utilities [including Telecommunications Carriers] whenever they have significant leverage to do so, and rely on the formula in all other carriers" whereas Telecommunications Carriers do not have that luxury.[8] In any event, the Commission should not strengthen and expand ILECs existing market power by adopting USTA's tortuous interpretation of Section 224.

In order to continue to encourage efficient facilities-based development by Telecommunications Carriers, the Commission must be sure that any new rule that would regulate the rates, terms and conditions for pole attachments of ILECs would not apply to the poles or conduit owned by Telecommunications Carriers. To do otherwise, the Commission would frustrate its goal to increase facilities-based competition and deployment of broadband Internet access by a diverse group of competitors.

---

[6] Reply Comments of Level 3 Communications, Inc., RM-11293 (Dec. 19, 2005) (hereinafter *Reply of Level 3*).

[7] *Reply of Level 3* at 6-7.

[8] *Id.* at 5

III. A SINGLE RATE, REGARDLESS OF SERVICE PLATFORM, SHOULD BE ADOPTED

The Commission should eliminate the differing cost methods for cable operators and Telecommunications Carriers and establish a single rate that applies to both types of entities. As the Commission is well aware, many attachments can be used–and are in fact used–to offer multiple services (voice, Internet access, video) but such attachments may be subject to vastly divergent rates depending on the classification of the attaching entity. These divergent rates create a significant disparity in the deployment costs for differing platforms that offer functionally equivalent services, including broadband Internet access service. The Commission should eliminate the divergent rates to that exist for cable operators and Telecommunications Carriers, which currently favor cable operators. By establishing a single rate for cable television system operators and Telecommunications Carriers," the Commission would equally promote the deployment of services on multiple platforms to compete with ILECs. Since the same attachment can often be used for broadband Internet access and other voice or video services, the Commission should not limit its even-handed treatment to just broadband Internet access services provided by cable operators and Telecommunications Carriers, but instead have a single rate for all services provided over the attachments of these entities. If the Commission decides to create a new single rate only for broadband Internet access services provided over any platform, the Commission should be careful to not exclude cable system operators and Telecommunications Carriers that provide wholesale bandwidth services that are not themselves broadband Internet access service but may be used by a carrier customer to provide broadband Internet access service to end-users.

Further, the single rate should be no greater than the current rate for Telecommunications Carriers. The Commission should consider making the single rate less than the current rate for

Telecommunications Carriers in order to be revenue neutral to pole owners and prevent a windfall to pole owners. In developing the single rate, the Commission should investigate and consider the financial reality that an attaching party pays the full cost for a replacement pole, which occurs in many cases when there is no usable space on an existing structure. Perhaps the cost for a replacement pole should not be wholly recovered from the new attaching party when installed, but also borne, in part, by all current and future attachers. In the alternative, the monthly recurring cost should be reduced for the new attaching party since that party already paid the full cost of installing the replacement pole.

IV. RULES GOVERNING TERMS AND CONDITIONS OF ACCESS BY TELECOMMUNICATIONS CARRIERS ARE NEEDED

The adoption of "best practices" for access by Telecommunications Carriers to poles and conduits is essential to promote the Commission's significant interest in the deployment of competitive facilities. The Zayo Bandwidth Entities incorporate the Comments of Indiana Fiber Works, LLC (now known as Zayo Indiana) filed in RM-11303. For the Commission's convenience, a copy of those Comments are provided as Attachment A, hereto. The Zayo Bandwidth Entities stress that the consistent application of the "best practices" suggested by Fibertech will reduce the significant frustration experienced by Telecommunications Carriers in dealing with diverse sets of policies of various pole owners. The adoption of the "best practices" will also reduce the costs and time for Telecommunications Carriers to establish facilities-based networks that will compete with ILECs. Such "best practices" should include a response time of fifteen (15) days for the pole owners for any "make-ready" requests of Telecommunications Carriers.

V. THE COMMISSION SHOULD CONFIRM THAT "USABLE SPACE" IN WHICH POLE OWNERS MUST PERMIT ATTACHMENTS INCLUDES THE SUPPLY SPACE

Zayo Bandwidth respectfully requests that the Commission confirm the conclusions that are implicit in – and required by – its prior interpretations of Section 224 by clarifying that, when a utility (a term that, under the Act and Commission rules, includes ILECs)[9] is required to make a pole available to third-party attachers, this obligation extends to all portions of a pole on which relevant safety and engineering standards permit attachments. In particular, there have been various instances in which pole owners have refused to allow attachments in the "supply space" of their poles – that is, the upper portion of the pole in which electric distribution facilities are installed.[10] As shown below, blanket denial of access to such space cannot be justified as a safety measure or on any other permissible grounds. The Wireless Bureau previously clarified that wireless carriers have the right pursuant to Section 224 to access the supply space – the tops of poles – for purposes of attaching antennas.[11] That Notice recognized that this right is not limited to wireless carriers, observing that in a prior order "the Commission declined ... to

---

[9] *See* 47 U.S.C. §224(a)(1) ("'utility' means any person who is a local exchange carrier or an electric ... or other public utility"); 47 C.F.R. §1.1402(a) (establishing the same definition).

[10] Pursuant to the National Electric Safety Code (NESC), the space on a utility pole, above the minimum ground clearance, is divided into three spaces (or "zones"). These are: (1) the "communications space," which is where telephone cables or cable television attachments are typically installed; (2) the "communication worker safety zone" (commonly referred to as the "safety space"), an area in which very few facilities may be installed and which is intended to prevent workers working in the communications space from accidentally coming into contact with electric distribution facilities; and (3) the "supply space" (typically referred to as the "power space"), which is where elements carrying electricity at 120 volts and above and other elements related to the electric distribution system are installed.

[11] *See* Public Notice, *Wireless Telecommunications Bureau Reminds Utility Pole Owners Of Their Obligations To Provide Wireless Telecommunications Providers With Access To Utility Poles At Reasonable Rates*, DA 04-4046 (December 23, 2004).

establish a presumption that space above what has traditionally been referred to as 'communications space' on a pole may be reserved for utility use only."[12]

Both Section 224 and the Commission's rules require a utility to provide any qualified attacher with "nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[13] The statute and rule both refer to a "pole" as a unitary object and mandate access to it, not merely to certain portions of it. The statute and rule further provide that a utility may deny access to a pole only in cases in which there is "insufficient capacity" or "for reasons of safety, reliability and generally applicable engineering purposes."[14]

Unless it can properly invoke one of the grounds specified in Section 224, a utility has no greater right to declare the supply space of a pole "off limits" than it would to arbitrarily refuse access to a portion of the communications space or to particular ducts within a conduit. Indeed, the Commission's rules define "usable space" – that is, space potentially usable by attachers – in a manner that necessarily includes the supply space: "the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility."[15] Tellingly, the Commission defines "unusable space" as "the space on a utility pole *below the usable space*, including the

---

12 *Id.* (citing *Order on Reconsideration*, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, 14 FCC Rcd 18049, 18074 ¶72 (1999)).

13 47 U.S.C. §224(f)(1); 47 C.F.R. §1.1403(a).

14 47 U.S.C. §224(f)(2); 47 C.F.R. §1.1403(a).

15 47 C.F.R. §1.1402(c). The Act's pole attachment provisions use the term "utility" to include both electric and telecommunications utilities. See 47 U.S.C. §224(a)(1) ("'utility' means any person who is a local exchange carrier or an electric ... or other public utility"); 47 C.F.R. §1.1402(a) (establishing the same definition).

amount required to set the depth of the pole."[16] Thus the Commission does not consider any space above the usable space as *per se* "unusable" or unavailable for attachments (other than on the same, limited grounds that portions of the communications space or any other area of the pole may be withheld).

There is, moreover, no valid safety-related rationale for denying attachers the ability to utilize the supply space. Because of their proximity to electric distribution equipment, line crews working in the supply space are required to have different training, equipment and certifications than those working exclusively in the communications space. The Commission anticipated such concerns more than a decade ago in its *Local Competition Order*, where it recognized that "a utility may require that individuals who will work attaching or making ready attachments of telecommunications or cable system facilities to utility poles, in the proximity of electric lines, have the same qualifications, in terms of training, as the utility's own workers...."[17] This reasoning was affirmed by the Eleventh Circuit, as was the Commission's decision that attachers could employ their own crews or contractors "who meet these criteria," rather than relying on utility employees.[18] It is thus well-settled that attachers who seek to work in the supply space must do so using workers qualified to work on that portion of a pole. Indeed, the Commission's and the Eleventh Circuit's decisions both confirm attachers' federal right to access the supply

---

[16] 47 C.F.R. §1.1402(l) (emphasis added). As a further example that the Commission only considers a pole to have two zones for attachment purposes (*i.e.*, usable space and unusable space), the Commission separates poles into only two portions for determining the attachment rates. 47 C.F.R. §1.1418.

[17] Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499 at ¶1182 (1996) (*Local Competition Order*) (subsequent history omitted).

[18] *Southern Company v. FCC*, 293 F3d 1338 (11th Cir. 2002).

space on utility poles, because the use of qualified electric line workers in "proximity to electric lines" is not relevant to attachments made only in the communications space.

There is also no basis for pole owners to object on safety grounds to the installation of attachments in the supply space. The National Electric Safety Code (NESC), which the FCC has long recognized as a key source for engineering and safety standards[19] (and compliance with which many states require by law),[20] expressly contemplates the installation of fiber optic cable and other facilities in the supply space. To take just one, relatively simple example, Line 1.b of NESC Table 235-5 (attached to these Comments as Attachment B) provides specifications for "Communications conductors and cables ... Located in the supply space."[21] In light of these (and numerous other[22]) explicit provisions in the NESC for installation of communications facilities in the supply space, utilities cannot plausibly support a blanket ban on all such attachments. In fact, a number of utilities[23] already have permitted fiber optic cables to be installed in the supply space of their poles.

---

[19] *Local Competition Order* ¶1151 ("in evaluating a request for access, a utility may continue to rely on such codes as the [National Electrical Safety Code] to prescribe standards with respect to capacity, safety, reliability, and general engineering principles").

[20] *See, e.g.*, 16 TEX. ADMIN. CODE § 25.101(d) (Vernon 2006).

[21] Institute of Electrical and Electronics Engineers, Inc., *National Electrical Safety Code* (2007 Ed.), Table 235-5. The Bellcore pole attachment "Blue Book," Manual of Construction Procedures (Bellcore Special Report SR-TAP-001421, 1998 ed.), which is also sometimes used as an attachments standards reference, also permits the placement of communications attachments in the supply space.

[22] *E.g.*, Note 5 to NESC Table 235-5 makes special provisions for the installation of certain types of fiber optic cables (those that are "entirely dielectric" – that is, that do not conduct electricity) in the supply space. Clearances "may be reduced to 30 in. for" *inter alia* "entirely dielectric fiber optic supply cables meeting Rule 230F1b."

[23] *See* http://www.fiberplanners.com/pages/utilities_and_fiber_why.html (web site of firm claiming to have worked with more than sixty utilities who have installed fiber optic cable in the supply space – "The supply region offers a safer environment for a fiber optic cable and provides more attachment space."); http://communityfiber.blogspot.com/2003/04/why-

Given the clear and unambiguous language in Section 224 requiring pole owners to make poles available to qualified attachers and the Commission's prior rulings in this area, it is plain that attachers should have the opportunity to make use of the supply space. Nevertheless, utilities routinely make categorical denials of access to this portion of their poles, forcing attachers to either pay for expensive make-ready work or for even more expensive pole replacements, despite the existence of available, usable space. The Commission should expressly confirm the conclusion compelled by its prior rulings, including the Wireless Bureau's acknowledgement that attachers may place antennas in the supply space:[24] Section 224 does not permit a utility to prohibit the use of the supply space on its poles, other than for the specific, limited grounds authorized in 47 U.S.C. §224(f)(2).

VI. CONCLUSION

As discussed above, Congress specifically excluded ILECs from the pole attachment rights of Telecommunications Carriers under Section 224. If the Commission decides otherwise, the Commission would be ignoring the clear import of Section 224 and be creating a policy that would negatively affect competition. The Commission should, however, establish a single rate of pole attachments of cable system operators and Telecommunications Carriers. A single rate, however, must be carefully drafted to not exclude pole attachments for facilities that Telecommunications Carriers provide on a wholesale basis. The Commission should also adopt "best practices" that will unify the procedures for attaching to pole and conduit. Similarly, the Commission should clarify that pole owners cannot prohibit pole attachments by Telecommunications Carriers in usable space, including the supply space. By taking these steps,

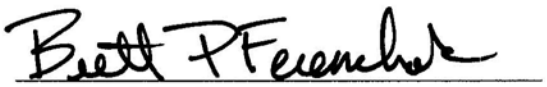
---

municipal-utilities-usually-use.html (explaining "Why municipal utilities usually use ADSS cable for their aerial fiber runs").

[24] Public Notice, *supra* note 10.

the Commission will continue to foster competition across multiple platforms for voice, Internet access, and video services.

Respectfully submitted,



Charles A. Rohe
Brett P. Ferenchak
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, D.C. 20006
Tel: (202) 373-6000
Fax: (202) 373-6001
charles.rohe@bingham.com
brett.ferenchak@bingham.com

Counsel for the Zayo Bandwidth Entities

Dated: March 7, 2008

ATTACHMENT A

Comments of Indiana Fiber Works, LLC
(now known as Zayo Indiana) filed in RM-11303

January 30, 2006

BY ELECTRONIC FILING

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: Petition for Rulemaking of Fibertech Networks (RM-11303)
Comments of Indiana Fiber Works, LLC

TO THE COMMISSION:

Indiana Fiber Works, LLC ("IFW") is pleased to submit the following comments in support of the petition of Fibertech Networks, LLC ("Fibertech"), requesting the Commission adopt certain "best practices" that address the need for improved competitor access to poles and conduits. As a facilities-based provider of dark fiber that is presently expanding its offerings to include advanced, integrated packages of telecommunications services, IFW has faced repeated barriers to gaining access to essential utility pole and conduit resources. IFW's fiber optic network is principally in Indiana, with smaller sections of its network located in Illinois, Ohio and Kentucky.

The Commission has correctly said in the past that pole attachments are crucial to the development of competition.[1] In the experience of IFW, no pronouncement has ever been more true. In proposing a series of "best practices," Fibertech has effectively described an environment in which ILECs and electric utilities delay the installation of competitive telecommunications facilities and increase the cost of construction. IFW would like to take note that municipally-owned utilities are generally less cooperative than ILECs and investor-owned

[1] *See, e.g., In re Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report & Order, 13 FCC Rcd. 6777, FCC 98-20, at ¶ 2 (rel. Feb. 6, 1998).

electric utilities. We make this statement not to suggest that the FCC should impose Fibertech's proposed best practices on municipal utilities; we have been advised of the statutory limitations on the Commission's authority to do so.[2] Rather, we point out that while ILECs and investor-owned utilities still have a ways to go, they generally impose fewer obstacles than municipal utilities, a fact which we attribute to the FCC's history of effective regulation of privately owned utilities that own or control poles, ducts, conduits and rights-of-way. In short, the Commission's regulation policies work. Accordingly, IFW looks to the FCC for assistance in resolving some of the remaining pole attachment problems.

As noted by Fibertech, a number of the best practices it proposes have already been implemented by some utilities, and certain of the proposed best practices have even been endorsed in the Commission's earlier decisions. However, there are hold-out pole owners who reject some of the common sense proposals suggested by Fibertech. Accordingly, IFW submits the following comments in support of Fibertech's petition.

The Commission should require pole owners to permit use of boxing and extension arms in appropriate circumstances.

IFW agrees with Fibertech that boxing of poles and use of extension arms can be a reasonable means of adding capacity to utility poles. In IFW's opinion, Fibertech has proposed reasonable criteria for deciding when boxing of poles and use of extension arms should be permitted, and their proposals should be endorsed by the Commission. IFW agrees with Fibertech that boxing of poles and use of extension arms are appropriate when they would render unnecessary a pole replacement or rearrangement of other carriers' facilities. We also agree with the criterion that boxing of poles and extension arms will only be appropriate when facilities on the pole are accessible by ladder or bucket trucks. Moreover, it seems axiomatic that if a pole owner has previously allowed the practice of pole boxing and use of extension arms, then non-discrimination rules should require that new entrants be afforded the same right. IFW notes, as

---

[2] *See* 47 U.S.C. § 224(a)(1) & (a)(3).

suggested by Fibertech's proposed criteria, that there are cases in which extension arms are not appropriate, and if a utility can demonstrate a practical safety or engineering reason why boxing of poles and use of stand-off facilities should not be used in a specific case, then the utility's decision should determine the question.

The Commission should establish shorter survey and make-ready time periods. The Commission should also require pole owners to allow installation of drop lines to satisfy customer service orders without prior licensing.

IFW's experiences in regard to survey and make-ready time periods have been similar to Fibertech's. In addition, IFW notes the substantially different time frames for handling its pole attachment applications by the various electric utilities to which it has submitted applications. These differences seem to demonstrate a gap in the degree of support for competition and respect for FCC rules by some utilities. IFW has experienced serious delays involving its applications to one of the principal pole owners in its service area, often exceeding 45 days. This pole owner also charges unreasonable fees for survey work, make-ready work and pole replacements, and has refused to allow survey work to be performed by approved contractors. Due to these practices, IFW has been forced to conclude on several occasions that attachments to this specific utility's poles are not a financially viable alternative. Unfortunately, in that utility's territory, if the expansion project cannot support new construction of underground conduit, then IFW must consider it a lost opportunity for expansion, even though there are existing poles in the area.

A single 45-day time frame for surveying and licensing of attachments is unreasonable for both pole owners and the attaching parties. As an example, IFW takes note of the fact that Fibertech has proposed that prior licensing be eliminated entirely for drop lines.[3] Drop lines usually require attachments to a very small number of poles (often just one), and survey work is usually very uncomplicated. Therefore, Fibertech advances the correct belief that requiring prior

---

[3] *In re* Petition of Fibertech Networks, LLC, Docket No. RM-1303, dated Dec. 7, 2005 (the "Fibertech Petition") at 21. Fibertech correctly notes that this proposal has already been endorsed by the FCC. *Mile Hi Cable Partners v. Public Service Co.*, PA 98-003, Order, 15 FCC Rcd. 11450 ¶ 20 (Cable Service Bureau 2000)

licensing before attaching to drop poles would be unnecessary in virtually every case. It is IFW's position that some attachments to mainline utility poles are almost as uncomplicated as drop lines, and a full 45-day waiting period is equally unreasonable. Accordingly, the FCC should take comments from pole owners and attaching parties to establish more flexible guidelines, with the goal of reducing the waiting periods imposed by utilities for small-scale survey projects.

IFW also proposes that time frames for surveys and conducting make-ready work be consolidated. It is our company's belief that internal records searches, field surveys and make-ready work for up to 750 poles should be routinely completed within 90 days.

The Commission should allow competitors to hire utility-approved contractors to perform field surveys and make-ready work, and should also require that joint users of poles coordinate their approvals of contractors, so that availability and make-ready surveys can be efficiently completed in a single work process.

IFW strongly agrees with Fibertech that pole owners should be required to engage in some form of pre-approval of contractors for make-ready surveys, and should recognize and accept survey reports prepared by approved contractors. Each utility should maintain its own list of at least three contractors that an attaching party may hire for survey work, with two goals: (a) that the utility have confidence in the survey work product delivered by the contractor; and (b) that attaching parties have as wide a choice of contractors as possible, so as to promote competition and thereby contain the cost of pole surveys and make-ready work. Also, IFW notes from its own experience that the policy of using approved survey contractors expedites the survey process for the utilities that already allow it, eliminating a source of dispute between utilities and attaching parties.

Use of utility-approved contractors for survey work also reduces the occurrences of double-payment. In most cases, an attaching party is not in the position to submit applications for attachment without conducting at least preliminary survey work of its own. Then, as required by most utilities' policies, the attaching party must pay the utility's actual costs of survey work

before approvals are received to begin make-ready work.[4] Therefore, the attacher is forced to pay for redundant survey work (its own preliminary survey plus the utility's office research and field survey), significantly increasing the cost of construction. Moreover, because poles are often jointly used by the electric utility and the ILEC, or because the ownership of the poles may not be clearly established at the time the applications for attachment are submitted, the attaching party may be forced to pay two utilities for survey work, resulting in a double-redundancy.

IFW also agrees that pole owners should allow the use of utility-approved contractors to perform make-ready work. As noted by Fibertech in its petition, the Commission's prior rulings have prohibited pole owners from requiring attaching parties to use the pole owner's workers for make-ready tasks.[5] Given the clarity of the Commission's prior rulings in this regard, it is remarkable that some pole owners continue to resist, although IFW understands that much of the problem arises from concerns over labor contracts with the utilities' employee groups.

The Commission should require pole owners to allow competitors to search utility records and survey manholes to determine availability of conduit, and limit charges if the utility performs these functions.

Many pole and conduit owners require that requests for access to facilities be accompanied by an access application form and a processing fee. At the same time, applicants for attachment are usually required to pay a fee for an office records review and field survey. The purpose of reviewing office records is to make a preliminary determination of whether or not structures are available in the areas requested by the attaching party. The field survey is intended to document pole and conduit locations, make a final determination that structures are available for occupancy, assess loading and guying requirements for poles, document the

---

[4] *See, e.g.*, GUIDELINES FOR ACCESS TO SBC COMMUNICATIONS INC. AND OPERATING COMPANIES STRUCTURE/SBC-13STATE (SBC Communications Inc., May 13, 2003), available at http://asac.ameritech.com/guideline.asp ("ASAC Guidelines").

[5] *Fibertech Petition at 20* (citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, First Report and Order, 11 FCC Rcd. 15499 (rel. Aug. 8, 1996) at ¶ 1182).

adequacy of clearances and provide make-ready notes, and develop estimates of the cost of make-ready work.[6]

Even if a pole or conduit owner has well-established policies (and, unfortunately, many do not), typical problems arise in which the utility fails to complete these tasks within the 45 days allowed by the Commission's rules, or charges fees for these services that exceed reasonable amounts. It is the opinion of IFW that one of the easiest methods of avoiding excessive survey fees and lengthy time frames is to allow attachers to review records and conduct surveys by use of their own independent contractors. This requires contractors to work with utility maps, access copies of utility databases, and usually requires that they work on utility premises. Obviously, pole and conduit owners are entitled to recover their costs of providing such support services to contractors, but the charges need to be reasonable and limited to the utility's actual costs.

The Commission should require utilities to share building-entry conduit with competitive LECs and cable providers.

Building entry conduit is critical for competitors In IFW's experience, Fibertech is accurate in saying that "landlords are extremely reluctant to permit the drilling of additional holes in building foundations to accommodate new conduit."[7] Fibertech's proposed rule is reasonable and should be adopted by the Commission.

In addition, IFW observes that it is not enough to merely require utilities to share building entry conduit. There must be a point at which a competitor accesses the conduit, which ordinarily requires access through a utility manhole close to the building, or cutting into the utility's conduit. In adopting Fibertech's recommendation, the Commission should also address the technical and practical issues of accessing the building entry conduit.

---

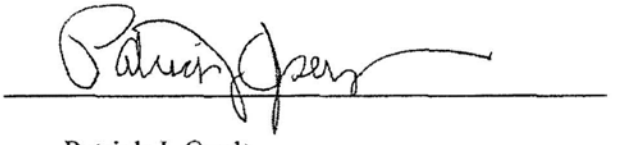
[6] *See* ASAC Guidelines at § 5.

[7] Fibertech Petition at 35.

In summary, Indiana Fiber Works supports the petition of Fibertech, as set forth in these comments. We hope that the description of IFW's experiences with pole and conduit matters, combined with its comments and suggestions, will help the Commission decide to grant Fibertech's request to initiate a rulemaking proceeding.

Respectfully submitted,

INDIANA FIBER WORKS, LLC



Patrick J. Opelt
Vice President, Business Development

cc:

Janice Myles (by U.S. Mail)
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C140
Washington, DC 20554

Best Copy and Printing, Inc. (BCPI) (by U.S. Mail)
Portals II, 445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

ATTACHMENT B

NESC Table 235-5

in

Table 235-5—
Vertical clearance between conductors at supports

(When using column and row headings, voltages are phase to ground for effectively grounded circuits and those other circuits where all ground faults are cleared by promptly de-energizing the faulted section, both initially and following subsequent breaker operations. When calculating clearance values within the table, all voltages are between the conductors involved. See the definitions section for voltages of other systems. See also Rules 235C1, 235C2, and 235F.)

Conductors and cables usually at lower levels	Conductors and cables usually at upper levels			
	Supply cables meeting Rule 230C1, 2, or 3; neutral conductors meeting Rule 230E1; communications cables meeting Rule 224A2 (in)	Open supply conductors		
		0 to 8.7 kV ⑩ (in)	Over 8.7 to 50 kV	
			Same utility ⑦ (in)	Different utilities ② (in)
1. Communication conductors and cables				
a. Located in the communication space	40 ① ⑤	40	40	40 plus 0.4 per kV ⑤ in excess of 8.7 kV
b. Located in the supply space	16 ③ ⑧	16 ⑧	40 ⑧	40 plus 0.4 per kV ⑤ in excess of 8.7 kV
2. Supply conductors and cables				
a. Open conductors 0 to 750 V; supply cables meeting Rule 230C1, 2, or 3; neutral conductors meeting Rule 230E1 ⑪	16 ③	16 ②	16 plus 0.4 per kV ⑤ in excess of 8.7 kV	40 plus 0.4 per kV ⑤ in excess of 8.7 kV
b. Open conductors over 750 V to 8.7 kV		16 ②	16 plus 0.4 ④ ⑥ per kV in excess of 8.7 kV	40 plus 0.4 per kV ⑤ in excess of 8.7 kV
c. Open conductors over 8.7 to 22 kV				
(1) If worked on energized with live-line tools and adjacent circuits are neither de-energized nor covered with shields or protectors			16 plus 0.4 per kV ⑤ in excess of 8.7 kV	40 plus 0.4 per kV ⑤ in excess of 8.7 kV

in

Table 235-5— *(continued)*
Vertical clearance between conductors at supports

(When using column and row headings, voltages are phase to ground for effectively grounded circuits and those other circuits where all ground faults are cleared by promptly de-energizing the faulted section, both initially and following subsequent breaker operations. When calculating clearance values within the table, all voltages are between the conductors involved. See the definitions section for voltages of other systems. See also Rules 235C1, 235C2, and 235F.)

Conductors and cables usually at lower levels	Conductors and cables usually at upper levels			
	Supply cables meeting Rule 230C1, 2, or 3; neutral conductors meeting Rule 230E1; communications cables meeting Rule 224A2 (in)	Open supply conductors		
		0 to 8.7 kV [11] (in)	Over 8.7 to 50 kV	
			Same utility [2] (in)	Different utilities [2] (in)
(2) If not worked on energized except when adjacent circuits (either above or below) are de-energized or covered by shields or protectors, or by the use of live-line tools not requiring line workers to go between live wires			16 plus 0.4 per kV [1] [4] in excess of 8.7 kV	16 plus 0.4 per kV [1] [4] in excess of 8.7 kV
d. Open conductors exceeding 22 kV, but not exceeding 50 kV			16 plus 0.4 per kV [1] [6] in excess of 8.7 kV	40 plus 0.4 per kV [1] [4] in excess of 8.7 kV

[1] Where supply circuits of 600 V or less, with transmitted power of 5000 W or less, are run below communication circuits in accordance with Rule 220B2, the clearance may be reduced to 16 in.

[2] Where conductors are operated by different utilities, a vertical clearance of not less than 40 in is recommended.

[3] These values do not apply to conductors of the same circuit or circuits being carried on adjacent conductor supports.

[4] May be reduced to 16 in where conductors are not worked on energized except when adjacent circuits (either above or below) are de-energized or covered by shields or protectors, or by the use of live line tools not requiring line workers to go between live wires.

[5] May be reduced to 30 in for supply neutrals meeting Rule 230E1, fiber-optic supply cables on an effectively grounded messenger meeting Rule 230F1a, entirely dielectric fiber-optic supply cables meeting Rule 230F1b, insulated communication cables located in the supply space and supported by an effectively grounded messenger, and cables meeting Rule 230C1 where the supply neutral or messenger is bonded to the communication messenger. Bonding is not required for entirely dielectric cables meeting Rule 230F1b.

[6] The greater of phasor difference or phase-to-ground voltage; see Rule 235A3.

[7] See examples of calculations in Rules 235C2a and 235C2b.

[8] Not used in this edition.

[9] No clearance is specified between neutral conductors meeting Rule 230E1 and insulated communication cables located in the supply space and supported by an effectively grounded messenger.

[10] No clearance is specified between fiber-optic supply cables meeting Rule 230F1b and supply cables and conductors.

[11] Does not include neutral conductors meeting Rule 230E1.

CERTIFICATE OF SERVICE

I, Brett P Ferenchak, hereby certify that on this 7th day of March, 2008, I have caused to be served a true and correct copy of the foregoing Comments of the Zayo Bandwidth Entities by electronic filing on the following:

Competition Policy Division, WCB
Federal Communications Commission
Room 5-C140
445 12th Street, S.W.
Washington, D.C. 20554
cpdcopies@fcc.gov

Best Copy and Printing, Inc.
Portal II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

Brett P Ferenchak